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No. 74-1145

In the Supreme Court of the United States

OCTOBER TERM, 1974

EDWARD COOK,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Moreover, considering such prejudicial prosecution conduct as a whole, with a realistic view toward its probable cumulative effect upon the fairness of petitioner's trial in the light of the aforesaid factual posture of the case, affirmance herein based on the Fifth Circuit's bald conclusion that the foregoing was not cognizable as plain error deprived petitioner of due process of law. Furthermore, such conclusion (that it did not amount to plain error) is contrary to numerous well-reasoned holdings in other Circuits 27

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Edward Cook, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Judgment Below

The opinion of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on December 20, 1974. Petition for rehearing, timely filed, was denied on February 13, 1975. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Was the evidence sufficient, as a matter of law, to sustain the convictions, where the government failed to prove that petitioner's expenditures were made from taxable income rather than prior accumulations, and petitioner conclusively established the existence of a cash hoard and assets convertible to cash in an amount more than sufficient to account for all his expenditures during the entire indictment period?

2. Where petitioner admittedly did not file income tax returns for the indictment years—typically, a misdemeanor under 26 U.S.C. 7203—may he stand convicted of the felony charge of wilfully having attempted to evade the tax under 26 U.S.C. 7201, absent sufficient evidence of any affirmative conduct on his part to defeat or evade the tax? Does not the Fifth Circuit's decision herein conflict both with the teachings of *Spies* v. *United States*, 317 U.S. 492, and with substantial judicial authority from the other Circuits, as to the necessity of evidence of affirmative conduct to support conviction for the felony offense?

3. Was petitioner deprived of his constitutional right to a fair trial by the cumulative prejudicial effect of prosecution misconduct amounting to plain error of constitutional magnitude, where the prosecutor:

(A) Attempted to discredit crucial defense witnesses—whose testimony, if believed, established that petitioner had accumulated cash and assets convertible to cash prior to the first indictment year sufficient to account for all his expenditures during the entire indictment period—by asking them, on cross-examination, questions pregnant with implied factual assertions, none of which was ever factually substantiated by the government, and some of which amounted to "testimony" by the prosecutor in conflict with said defense witnesses' unrebutted and unimpeached testimony;

(B) Improperly and prejudically referred in closing argument to petitioner's allegedly incriminatory statement which had been ordered suppressed by the trial court, and misstated evidence;

(C) Improperly argued that petitioner "lied" and that he had "hidden" matters from the jury, thus indicating the prosecutor's knowledge of matters not in evidence and placing his opinion of petitioner before the jury, and prejudicially commenting to the jury upon petitioner's failure to testify?

Moreover, considering such prejudicial prosecution conduct as a whole, with a realistic view toward its probable cumulative effect upon the fairness of petitioner's trial in the light of the aforesaid factual posture of the case, does affirmance herein based on the Fifth Circuit's conclusion that the foregoing was not cognizable as plain error (notwithstanding the error was raised in post-trial motion for new trial) deprive petitioner of due process of law; and is not such conclusion (that it did not amount to plain error) contrary to numerous well-reasoned holdings in other Circuits?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

The Internal Revenue Code of 1954 (26 U.S.C.), provides in pertinent part as follows:

> Sec. 7201. Attempt to Evade or Defeat Tax.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> Sec. 7203. Willful Failure To File Return, Supply Information, Or Pay Tax.
>
> Any person required * * * to make a return * * * who willfully fails to * * * make such return, * * * at the time or times required by law or regulations, shall, . . . be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Statement of the Case

Petitioner, Edward Cook, originally was charged in a ten-count indictment (No. 71-263-Cr T) with violations of the Internal Revenue Code for the tax years 1966 through 1970. Counts 1 through 5 charged violations of 26 U.S.C. 7201, willful attempt to evade the tax, a felony, for each of the respective prosecution years. (Counts 5

through 10, charging violations of Sec. 7203, willful failure to file tax returns, a misdemeanor, for the same years, respectively (A. 1),[1] were dismissed (A. 3).)

Petitioner was found guilty of each of the five felony counts, 1 through 5 (A. 3), and was sentenced to a term of five years on each count to run concurrently. (A. 4)

Statement of Facts

It was not disputed that petitioner did not file any income tax returns for the years in question.

Government's Evidence

The government proceeded to attempt to prove its case by way of the expenditures theory. Most of the voluminous exhibits were introduced into evidence without objection and by stipulation. Some witnesses, however, were presented by the government on the witness stand, in order to lend "color" to the case. (A. 6)[2] The evidence, by way of stipulation and witnesses before the jury, demonstrated that in each of the indictment years, petitioner spent, by way of checks and cash, the approximate sums set out in each of the counts of the indictment.

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[1] "A." refers to Appellant's Appendix filed in the Court of Appeals for the Fifth Circuit in cause No. 74-1164. "Tr." refers to the Transcript of Proceedings at trial.

[2] Despite a defense offer to stipulate thereto, the government introduced evidence of certain expenditures via witnesses in its efforts to convince the jury that petitioner was a jewel thief. Such evidence pertained to petitioner's purchase of technical locksmith books and tools, and a "spy bug detector." (A. 6, Tr. 44; A. 7, Tr. 90-104)

The government did not prove a source of income.

Harry Marden, an IRS agent, testified he prepared certain schedules based upon the testimony and stipulations introduced into evidence; and that such schedules (Exhibits 94 to 98 for the respective years, 1966 through 1970) demonstrated taxable income and taxes due for each of the indictment years. (A. 12, Tr. 235) On cross-examination, he stated that if petitioner had $150,000 at the beginning of 1966, such would not be taxable, and petitioner could spend that money without being required to file an income tax return, unless he earned over $600 during that year. (Tr. 254) The expenditures on the summaries made by the witness from 1966 to 1970 totalled roughly $137,000 to $140,000. If petitioner had a cash accumulation before the taxable years, those expenditures would be offset by the cash accumulation. (Tr. 254)

Additional evidence relied on by the government in its attempts to demonstrate "evasion" of tax by petitioner is set forth as App. C.

Evidence on Behalf of Defendant

Howard Brodsky, an insurance adjuster and consultant, testified that in 1963 he was in the surety business and that petitioner placed with him certain collateral, being a 1963 convertible Cadillac, a gold coin collection as well as some additional gold coins, and a diamond whose value was appraised by a gemologist to be in excess of $75,000. (A. 12, Tr. 167) The gold coins and the ring were evaluated at over $150,000. (A. 13, Tr. 271) Three FBI agents, including agents Guilfoile and Kelly, saw the gold coin collection and the diamond ring in a safety deposit box sometime in 1964. (A. 13-14, Tr. 272) Brodsky returned the collateral directly to petitioner "sometime in 1967." (Tr. 269)

Sometime in 1964, petitioner gave Brodsky his written power of attorney, via which Brodsky entered petitioner's safety deposit box in the Little River Bank, Little River Miami and removed approximately $28,000 to $38,000 in cash and five to eight diamonds of various sizes. (Tr. 270) He delivered the cash and the diamonds to petitioner sometime in 1966. (Tr. 271)

The prejudicial cross examination by the prosecutor.

"Q. Do you remember telling special agent Guilfoile where the gold coins came from?

A. Not that I can recall, I may have.

Q. Isn't it a fact, sir, you told them those coins were submitted to you by Martin Katz and were owned by Martin Katz?

A. I don't believe so.

Q. Isn't it a fact you also later told them you returned the gold coins not to Clarence,[3] but John Cook?

A. Not so, because it was returned to Mr. Cook.

Q. Isn't it a fact you told the FBI agents it was returned to Clarence Cook?

A. I don't think so." (A. 14-15, Tr. 275-76)

* * *

"Q. Now, do you recall the diamond?

A. Yes, sir.

Q. It was a yellow diamond, wasn't it, was it referred to as a canary yellow in the trade?

A. Yes.

Q. Approximately 24 carats? Did you tell the FBI where that came from?

A. I don't recall that I really told them anything. The purpose of the meeting was to show him the property, and I don't particularly recall having any of this conversation that you are relating here.

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[3] The transcript so reads at p. 275; but Edward Cook is obviously meant, here.

Q. Do you recall having a meeting with the FBI.
A. Oh, yes.
Q. Do you recall the conversation?
A. I don't believe we had any conversation. They had made a request to examine the property. I made it available to them. When they were through, we put it back in the box, and to the best of my recollection, that was all that transpired." (A. 15, Tr. 276-77)

"Q. Didn't you tell the FBI that the 27-carat diamond was owned by Martin Katz?
A. No, sir.
Mr. Bailor (prosecutor): No further questions, your Honor." (A. 16, Tr. 278)

Ron Hanson, who knew petitioner for about 15 years (A. 16), testified he lived in Miami, Florida and owned a chain of beef outlets and freezer meat companies in various cities in the south. While petitioner was in Chicago in December, 1965, he invited petitioner to go into the business of manufacturing wigs. He wanted petitioner to invest $35,000, but petitioner declined. However, petitioner loaned him that sum in cash. Hanson subsequently went to Canada and tried to buy the business, but could not; later he returned the cash to petitioner in February or March 1966. (A. 16, Tr. 280-81)

Richard Chapman of Miami, Florida was a self-employed wholesale diamond broker. He testified that in 1968 he was associated in the diamond business with Herman Gordon. In June, 1968, petitioner brought to him and Gordon a 22-carat, 70-point large canary diamond. "It was the largest canary diamond I had ever seen." (A. 16, Tr. 290) Petitioner wanted $100,000 for the diamond, but they agreed upon the sum of $85,000, and that money was paid to petitioner in June, 1968. (A. 16, Tr. 290-91)

The prejudicial cross examination by the prosecutor.

"Q. Are you telling me as an expert in the diamond business that all diamond merchants deal exclusively in cash?

A. I didn't say all diamond merchants deal exclusively in cash. I say primarily. We have always dealt in cash with very, very few exceptions. It is a common practice in the trade that most transactions are made in a cash basis." (A. 17, Tr. 295)

* * *

"Q. Was this strictly a cash transaction?

A. Yes, sir.

Q. And you have no record of it?

A. I would say 90%, 98% of all sales made are cash.

Q. In your business?

A. In my business, yes, sir.

Q. But you are not prepared to state whether this is the custom through the diamond trade?

A. I would say it is, yes, sir. I would say throughout the diamond business on a wholesale level between diamond brokers and that, it is primarily cash.

Mr. Bailor: No further questions, your Honor." (A. 17, Tr. 298-99)

The announcement by the prosecutor of prospective rebuttal.

"Mr. Bailor: I have some rebuttal, incidentally, your Honor.

The Court: What kind of rebuttal do you have?

Mr. Bailor: I want to examine some reports on what evidence we have with respect to this collection of coins and jewels in 1963." (A. 18, Tr. 302)

The rebuttal.

There was no rebuttal by the prosecution.

REASONS FOR GRANTING THE WRIT

1.

The evidence was insufficient, as a matter of law, to sustain the convictions, where the government failed to prove that petitioner's expenditures were made from taxable income rather than prior accumulations, and petitioner conclusively established the existence of a cash hoard and assets convertible to cash in an amount more than sufficient to account for all his expenditures during the entire indictment period. Certiorari should be allowed so that this Court may speak to the requirements of proof in an "expenditures" method income tax prosecution, involving important questions of federal law which have not been, but should be, resolved by this Court.

The government proceeded by way of the so-called "expenditures" theory of proof, which is a variant of the frequently used "net worth" theory, the latter having been "grudgingly" approved as a method of proof in certain tax cases in *Holland* v. *United States*, 348 U.S. 121 (1954). This Court approved its use "grudgingly," recognizing that the net worth method of proof could be dangerous to an innocent defendant, and stressed that its use must be carefully scrutinized by the judiciary. *Id.* at 129.

And while the Court has had occasion to resolve various questions regarding the net worth method in *Holland*, *supra*, and in *United States* v. *Massei*, 355 U.S. 595 (1958), it has not yet reviewed an income tax evasion conviction where the government proceeded—as in the case at bar—by the "expenditures" theory of proof.

Here, there was substantial, unrefuted evidence that defendant possessed cash and assets convertible to cash more than adequate to cover all the expenditures made during the indictment years. (See pp. 6-9, *supra.*) Indeed, the government's sole and only attempt to counter this strong defense evidence consisted of improper innuendo during the questioning of the defense witnesses;[4] the factual assertions contained in such questions were never demonstrated by any evidence whatsoever.[5]

The Courts of Appeal have consistently held that, when utilizing the "expenditures" method of proof, the govern-

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[4] See Point 3(A), pp. 18-24, *infra.*

[5] After verdict of guilt on July 13, 1973, the trial court held an evidentiary hearing on August 6, 1973 on petitioner's assertions that the government withheld from petitioner at trial *Brady* exculpatory evidence. Defense witness Brodsky testified he entered the Little River Bank, Miami, with Cook's power of attorney and removed $28,000 or $38,000 dollars in cash and 5 to 8 diamonds (one of which was appraised at $75,000 dollars) which money and diamonds he gave to petitioner Cook in 1966. (Tr. 270-71, trial-in-chief). To rebut, the government had one, George Bourbeau, who was in charge of the Safety Deposit Box Department at the bank, testify that Brodsky's name is not on any entry card, and further, that no power-of-attorney is recognized except on a form provided by the bank. (Tr. 65-76 of 8/6/73).

The trial court denied the petitioner's motion; and the government indicted Brodsky on June 13, 1974, charging him with perjury. But in September, 1974, Brodsky's attorneys caused the President of the bank to search for the records that Brodsky claimed existed and lo and behold!, the documents were found showing the existence of the power-of-attorney and of Brodsky's signature on the box entry card. Accordingly, the government moved to dismiss the Brodsky indictment, which motion the trial court allowed on November 26, 1974.

ment must show: (1) opening available funds at the beginning of each prosecution year,[6] (2) available funds acquired during the year; (3) expenditures for the prosecution year in excess of (1) plus (2); and (4) the government must exclude non-taxable sources of available funds by affirmative evidence. *Dupree* v. *United States*, 218 F.2d 781, 784 (5 Cir. 1955); see *Taglianetti* v. *United States*, 398 F.2d 558, 562-66 (1 Cir. 1968). The government has not presented adequate proof in the case at bar to meet these requirements.

The instant decision presents an excellent opportunity for this Court for the first time to speak to the requirements of proof in an expenditures-method tax prosecution. The questions raised herein, regarding the government's burden to establish that the expenditures were made from taxable income where the defense provides ample and uncontradicted showing of prior accumulations sufficient to account for the proven expenditures, constitute important questions of federal law which have not been, but should be, decided by this Court. (Supreme Court Rule 19(1)(b).)

Certiorari should therefore be allowed, and, upon this record, petitioner's convictions should be reversed for failure of sufficient proof as a matter of law.

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[6] While the government attempted to prove petitioner's lack of opening assets by way of his ex-wife's testimony, (Tr. 226-27), that she knew of no such assets, it was demonstrated on cross-examination that, due to their separation, she could realistically testify to nothing concerning petitioner's activities and assets during the times pertinent to this cause. (Tr. 227-31)

Moreover, the government's evidence designed to portray petitioner as a jewel thief served instead to corroborate petitioner's prior accumulations defense. (See A. 5, 8; see footnotes 2 and 5 pp. 5 and 11, *supra.*)

2.

Absent sufficient evidence of any affirmative conduct on petitioner's part to defeat or evade the tax, petitioner may not stand convicted of the felony charge of wilfully having attempted to evade the tax under 26 U.S.C. 7201, where the government's relevant evidence served merely to demonstrate that petitioner failed to file income tax returns for the indictment years, as was admitted by petitioner—which failure to file amounts only to a misdemeanor under 26 U.S.C. 7203. The Fifth Circuit's decision affirming the felony convictions herein conflicts both with the teachings of this Court in Spies v. United States, 317 U.S. 492, and with substantial judicial authority from the other Circuits, as to the necessity of evidence of affirmative conduct to support conviction for the felony offense.

The felony counts of which petitioner was convicted each alleged that he committed the offense of attempted evasion of taxes by failing to file income tax returns for the years in question and to pay taxes for those years, by "concealing and attempting to conceal . . . a true and correct taxable income" in violation of 26 U.S.C. 7201. (A. 1)

The evidence herein established only that petitioner failed to file tax returns and to pay taxes for the years in question; there was no relevant evidence tending to show that he committed any affirmative acts to conceal or attempt to conceal his true taxable income.

Although petitioner engaged in some cash transactions, bank and checking accounts were in his own name and that of his wife; his home, car and boat were all purchased and maintained in his own name; and insofar as he did deal in cash, such dealing is normal for the type of "business" petitioner had engaged in—thievery, per the government's

theory. Thus the government was in no way misled, and certainly, the trail of expenditures via check, money order, and cash—always in petitioner's own name—can in no legitimate way be interpreted as "concealment" per the indictment and the requirements as set forth by this Court regarding the proof necessary to establish the felony offense.

Two definitive decisions by this Court compel the conclusion that the trial court should have granted petitioner's motion for acquittal as to all the felony counts. *Spies* v. *United States,* 317 U.S. 492 (1943), involved the requirements for proving violation of then-existing felony and misdemeanor tax statutes, (substantially the same as the statutes involved in the instant case). The Court reversed because the trial court refused to instruct the jury that an affiirmative act was necessary to support a felony conviction (see requested instruction, *Id.* at 494). The Court stated:

> "The difference between the two offenses . . . is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. . . . The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended *some willful commission in addition to the willful omissions that make up the list of misdemeanors.* Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it *a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.*" 317 U.S. at 498-99. (Emphasis added.)

In *Sansone* v. *United States*, 380 U.S. 343 (1965), this Court again had occasion to analyze the differing elements of the felony and misdemeanor charges, this time under the present statutes and reaffirmed the holding of *Spies, supra.* 380 U.S. at 351.

No case was discovered wherein mere failure to file a tax return and to pay a tax was held sufficient to sustain a felony conviction under Sec. 7201. Yet that, in essence, is what the Fifth Circuit has held in the case at bar.

Although *United States* v. *Schipani*, 362 F.2d 825 (2 Cir. 1966) (cert. granted on wiretapping issue only, 385 U.S. 825, aff'd after retrial, 414 F.2d 1262 (2 Cir. 1969)), may appear so to hold, a careful reading of the original opinion (362 F.2d 825) reveals affirmative acts in addition to the mere failure to file, namely, "evidence of Schipani's apparent attempts to conceal income . . . through use of assumed names and other devices . . ." 362 F.2d at 831. There is no such evidence in the case at bar; on the contrary, as previously noted, petitioner consistently used his correct name in all transactions, and utilized no devices whatsoever in any attempt to conceal his assets or income.

In *United States* v. *Penosi*, 452 F.2d 217 (5 Cir. 1971), the court affirmed felony convictions because Penosi actively sought to conceal his income by consistently understating his income. (See Gov't. Br., in *Id.*, No. 31,151, p. 12.) In the case at bar, however, petitioner never understated his income, but consistently maintained that his expenditures were made from cash and assets previously on hand, and maintained bank accounts in his own name and jointly with his wife.

In those cases where convictions have been affirmed, there was sufficient evidence of affirmative conduct such as that described in *Spies, supra.* Where such evidence is absent, the courts reverse. Even the Fifth Circuit has previously

so held. See, *e.g., Clay* v. *United States*, 218 F.2d 483, 485-86 (5 Cir. 1955); *Jones* v. *United States*, 164 F.2d 398 (5 Cir. 1947); *Wardlaw* v. *United States*, 203 F.2d 884, 886 & 886 n.3 (5 Cir. 1953); *Reynolds* v. *United States*, 288 F.2d 78 (5 Cir. 1961); *United States* v. *Stone*, 431 F.2d 1286, 1288 (5 Cir. 1970).

In *United States* v. *Newman*, 468 F.2d 791 (5 Cir. 1972), the Fifth Circuit held that a Sec. 7201 violation may occur where there is a failure to file the return (ordinarily, the misdemeanor Sec. 7203 violation), detailing the specifics by which Newman's felony conviction was affirmed. *Id.* at 793.

No such conduct by petitioner was shown in the instant case. In essence, all the government showed was failure to file returns and to pay tax for the years in question.

A number of cases from other Circuits, following the teachings of *Spies* and *Sansone, supra*, have reiterated the distinction between the felony and the misdemeanor as being the requirement of affirmative conduct, as opposed to mere omissions, to support a conviction for the felony, affirming only where the evidence establishes affirmative conduct. See, *e.g., United States* v. *Masheski*, 286 F.2d 345, 346 (7 Cir. 1961); *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 (2 Cir. 1972); *Gariepy* v. *United States*, 220 F.2d 252, 257-58 (6 Cir. 1955); *Elwart* v. *United States*, 321 F.2d 928, 935-36 (9 Cir. 1956); *Kirsch* v. *United States*, 174 F.2d 595 (8 Cir. 1949); *United States* v. *Smith*, 206 F.2d 905 (3 Cir. 1953); *United States* v. *Coppola*, 425 F.2d 660 (2 Cir. 1969); *United States* v. *Kafes*, 214 F.2d 887, 890 (3 Cir. 1954); *United States* v. *Cave*, 159 F.2d 464, 466-67 (8 Cir. 1947); *Cf. United States* v. *Vitiello*, 363 F.2d 240, 243 (3 Cir. 1966).

Petitioner herein has demonstrated the abundant and uncontradicted evidence of his possession of a large cash hoard and considerable gold coins and jewelry assets, converted to cash, more than sufficient to cover all of the expenditures claimed by the government. (See Point 1, *supra.*)

The Fifth Circuit's ruling on this issue constitutes a substantial departure from foregoing case law, since there was no evidence of affirmative conduct by petitioner. Certiorari should be granted to make clear this Court's previously stated position concerning the requirement of proof of affirmative conduct to support the felony conviction, and to resolve an apparent conflict amongst the Circuits.

3.

Petitioner was deprived of his constitutional right to a fair trial by the cumulative prejudicial effect of prosecution misconduct amounting to plain error of constitutional magnitude, where the prosecutor:

A. Attempted to discredit crucial defense witnesses —whose testimony, if believed, established that petitioner had accumulated cash and assets convertible to cash prior to the first indictment year sufficient to account for all his expenditures during the entire indictment period—by asking them, on cross-examination, questions pregnant with implied factual assertions, none of which was ever factually substantiated by the government, and some of which amounted to "testimony" by the prosecutor in conflict with said defense witnesses' unrebutted and unimpeached testimony;

B. Improperly and prejudicially referred in closing argument to petitioner's allegedly incriminatory

statement which had been ordered suppressed by the trial court, and misstated evidence;

C. Improperly argued that petitioner "lied" and that he had "hidden" matters from the jury, thus indicating the prosecutor's knowledge of matters not in evidence and placing his opinion of petitioner before the jury, and prejudicially commenting to the jury upon petitioner's failure to testify.

Moreover, considering such prejudicial prosecution conduct as a whole, with a realistic view toward its probable cumulative effect upon the fairness of petitioner's trial in the light of the aforesaid factual posture of the case, affirmance herein based on the Fifth Circuit's bald conclusion that the foregoing was not cognizable as plain error deprived petitioner of due process of law. Furthermore, such conclusion (that it did not amount to plain error) is contrary to numerous well-reasoned holdings in other Circuits.

A.

It is fundamental that a lawyer on either side may not raise to the level of probative evidence, inferences interjected into the case only through his questions.

At issue was whether petitioner had any assets at the start of any Count-year or a cash hoard from which the expenditures proven in each of the Count-years could have been made.

In his opening address to the jury, defense counsel stated that he would present evidence of the existence of assets and a cash hoard sufficient to demonstrate the source of the expenditures. (Tr. 13-17) In accordance with that pronouncement, the defense presented witnesses Brodsky (Tr. 265-278), Hanson (Tr. 279-282) and Chapman (Tr. 289-299). Their testimony effectively provided a

complete and total defense to the charges. (See pp. 6-9, *supra.*) Accordingly, the jury's evaluation of their credibility was crucial to their determination and resolution of the issues involved. Each of the witnesses testified, with a large mass of corroborative detail, that petitioner indeed had assets convertible to cash and also had sizable sums of cash.

To rebut this testimony, fatal to the government's case, the prosecutor used, to considerable effect, an impermissible and condemned trick of cross-examination by which the questioner implies the contrary of an answer given by the witness—and then fails to rebut with any evidence, although there was opportunity so to do.

Brodsky testified he was an insurance man and that as such, sometime in 1963, petitioner posted with him as collateral, a gold coin collection and a diamond, which diamond was appraised "in excess of $75,000" (Tr. 267) and the total was appraised in excess of $150,000. (Tr. 271) The collateral was returned directly to petitioner "sometime in 1967." (Tr. 269)

Additionally, in 1964, using a written power of attorney given to him by petitioner, he went to the Little River Bank in Little River, Miami and removed the contents of petitioner's safety deposit box, which contained from $28,000 to $30,000 in cash and 5 to 8 diamonds. (Tr. 270) He delivered the cash and the diamonds to Cook "sometime in 1966". (Tr. 271).[7] At the time he held the collateral for petitioner, three FBI agents knew of the existence of that collateral, since they were at the bank in 1964 and the contents of the safety deposit box were shown to them. (Tr. 272)

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[7] See footnote 5, p. 11, *supra.*

Thus, Brodsky gave strong evidence, supplying considerable corroborative detail which could have been rebutted before the jury, if untrue, as to the existence of both assets and a cash hoard from which petitioner could have made *all* of the expenditures involved in the case.

The cross-examination then proceeded. It was obvious that the prosecutor knew that FBI agents had examined the collateral in the safety box—just as Brodsky testified—for the prosecutor, asked, "Incidentally, was the other FBI agent a gentleman by the name of Shultz, perhaps was the other FBI agent you referred to?" (Tr. 273)

Did the prosecutor call any of the three agents to rebut Mr. Brodsky's testimony? Of course not.

Initially, when the defense rested and when the court assumed the prosecutor would rebut, he did not disappoint, for he told the court:

> "I have some rebuttal, incidentally, your Honor.
> The Court: What kind of rebuttal do you have?
> Mr. Bailor: *I want to examine some reports on what evidence we have with respect to this collection of coins and jewels in 1963.*" (Tr. 302) (Emphasis added.)

But there was no rebuttal.

Presumably, the prosecutor did what he said he would do —examine his evidence and reports with respect to the coins and jewels. He found nothing with which to rebut Brodsky's testimony. Either, then, he chose not to submit such evidence as he had to the crucible of cross-examination in front of the jury, or he was without *bona fides* in his crucial examination of Brodsky.

In either event, the error contaminated any fairness of trial.

The prosecutor adopted a vicious and unwarranted tactic which should be denounced, as it has been denounced by other courts. The full ploy of the prosecutor's desire to achieve conviction at all costs is demonstrated by the suggestions of evidence implicit in the questions asked of Brodsky. The following occurred:

> "Q. (By the prosecutor): And the FBI agents inventoried the safety deposit box, did they not?
>
> A. I don't know that they inventoried it. We made it all available to them. We laid it out on the table in the bank, and they proceeded to inspect it, to do whatever they came to do.
>
> Q. You had conversation with the FBI Agents at the time, did you not?
>
> A. Possibly.
>
> Q. Do you remember the conversation?
>
> A. Not verbatim, no.
>
> Q. Do you remember telling Special Agent Guilfoile where the gold coins came from?
>
> A. Not that I can recall, I may have.
>
> Q. *Isn't it a fact,* sir, you told them those coins were submitted to you by Martin Katz and were owned by Martin Katz?
>
> A. I don't believe so.
>
> Q. *Isn't it a fact* you also later told them you returned the gold coins not to Clarence,[8] but John Cook?
>
> A. Not so, because it was returned to Mr. Cook.
>
> Q. *Isn't it a fact* you told the FBI Agent it was returned to Clarence Cook?
>
> A. I don't think so." (Tr. 275-76) (Emphasis added.)

With respect to a canary yellow diamond, approximately 24 or 27 carats, the prosecutor asked, "Did you tell the FBI where that came from?" Brodsky said he didn't recall that he really told them anything. (Tr. 276) But

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[8] The transcript states as quoted. But either the court reporter misheard, or the prosecutor misstated; for clearly, "Edward" is meant here.

the prosecutor implied to the jury that Brodsky, in fact, *did* tell the FBI something, contrary to his direct testimony. The coup of the entire cross examination was the conclusory question:

> "Q. *Didn't you tell the FBI that the 27 carat diamond was owned by Martin Katz?*
> A. No, Sir.
> Mr. Bailor: No further questions, your Honor." (Tr. 278) (Emphasis added.)

Thus, by the end of Bailor's cross examination, the prosecutor implanted in the minds of the jury that Brodsky was a liar, that the gold coin collection was owned by Martin Katz, that Brodsky so told the FBI agents, and that the diamond (later sold by petitioner for $85,000, according to defense witness Richard Chapman; see Tr. 291) was also owned by Martin Katz *and that Brodsky so told the agents.*

Pretty powerful evidence rebutting Brodsky's direct testimony, and destroying the entire basis of the defense.

And in equally invidious fashion, the prosector employed the same technique to nullify Chapman's testimony that petitioner sold the canary diamond for $85,000 in 1966. (See pp. 8-9; *supra; cf.* p. 26, *infra.*)

Having asked those questions and having received those negative answers, the prosecutor was duty bound in law—and in fairness—to rebut before the jury. If he could not, he had no right asking the questions in the manner that he did. His failure to rebut with any witness requires a new trial.

The questions were pointedly specific so as to imply specific and accurate knowledge of evidence implicative in the prosecutor's questions. The accusatory questions could not fail to impress upon the jury that the prosecutor had knowledge of such facts, otherwise the prosecutor would not have asked such questions. *See Berger* v. *United Staes*, 295 U.S. 78, 88 (1935).

The prejudice lies in the implication from the mouth of the spokesman for the government, regardless of the witness' answers. In *Jones* v. *United States,* 338 F.2d 553 (D.C. Cir. 1964), the court reversed and remanded because the prosecutor's questions (on direct and redirect examination of its own witness) contained improper inferences which were never proven, even though the jury was instructed that the counsel's statements were not evidence and *although the witness' answers to the improper questions—as here—denied the factual assertions contained in the questions.* Even more strikingly, in *Richardson* v. *United States,* 150 F.2d 58, 64 (6 Cir. 1945), the court reversed and remanded even though the improper questions, which contained unjustifiable accusations, were withdrawn and never answered.[9]

Other cases reversing for such improper prosecution conduct include: *United States* v. *Perlstein,* 120 F.2d 276 (3 Cir. 1941); *Lee Won Sing* v. *United States,* 215 F.2d 681 (D.C. Cir. 1954); and *cf. United States* v. *Bohle,* 445 F.2d 54 (7 Cir. 1971). See also *King* v. *United States,* 372 F.2d 383, 394 (D.C. Cir. 1967).

In *Stewart* v. *United States,* 366 U.S. 1 (1961), a defendant was on trial for the third time after two reversals. At the third trial he decided to testify on his own behalf, whereas in the first two trials he did not do so. The prosecutor asked him on cross-examination "This is the first time you have gone on the stand, isn't it Willie?" On appeal, the prosecutor argued that no inference could have been drawn from that question, but the Court rejected that by stating:

> "Indeed, the recognition that such an inference will in all likelihood be drawn from leading questions of this

[9] Thus, the court recognized that it is in the implication of the question itself that the prejudice lies.

kind lies at the root of the long established rule that such questions may not properly be put unless the inference, if drawn, would be factually true." *Id.* at 7.

The real vice of the prosecutor's dubious cross-examination lies in the effect upon the jury of such statements of fact *aliunde* the record when made by a representative of the government. The jury was very well aware of the extent of the federal investigative apparatus.[10] In such circumstances, the prosecutor's cross was an invitation to the jury to accept without proof the truth of the facts implicit in his questions without regard to the repeated denials of Brodsky and Chapman. If the prosecutor's statements were true and the witnesses' denials consequently false, evidence should have been submitted to the jury to sustain that position. Yet, when the time came for the prosecutor to present rebuttal, he rested without calling one single witness.

B.

Special IRS agent Childress testified on direct examination that during the course of his investigation he interviewed petitioner. "He told me that he never filed income tax returns, that he knew the requirements of filing, and that he never made $600 a year in his life." (Tr. 155)

During the course of the case, it developed that Childress had interviewed petitioner at his home. Certain matter stated to Childress by petitioner was ruled inadmissible by the court because the agent did not follow the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). (A. 10, Tr. 208) (See App. C, p. App. 12)

Yet, repeatedly in his closing argument, the prosecutor made the suppressed statement the main basis of his argu-

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[10] "The question is not whether the prosecutor meant 'to insinuate' that his statement was based on personal knowledge. *The question is what the jury probably thought.*" *United States* v. *Handman*, 447 F.2d 853, 856 (5 Cir. 1971). (Emphasis added.)

ment to the jury that petitioner was mindful in his intent to evade the tax. And the prosecutor violated the judge's order—and petitioner's constitutional rights—both in the opening and the closing of his final argument to the jury.

Thus, it is clear that the only statement of petitioner which the jury was to receive was his statement that he did not file a tax return because he didn't have to. The statement that he did not make $600 in any year was "out of the window," according to the court's ruling. (Tr. 208)

With knowledge and with understanding of the court's ruling that the statement that he never made $600 a year was suppressed ("out of the window"), the prosecutor nonetheless repeatedly argued that Cook's statement to the IRS was that he "never made $600 a year in my life. All my property is in my wife's name." (Tr. 327)

And again Bailor argued that when the IRS comes around, Cook said, "No, I didn't file tax returns. I didn't make $600 a year in my life." (Tr. 329) Again, addressing the jury, the prosecutor argued, "He expects you to believe, ladies and gentlemen, he never had $600 worth of income in his life." (Tr. 331)

Thus, the prosecutor argued from evidence specifically excluded by the court as mandated by *Miranda*.[11]

When the prosecutor argued to the jury, "Only after the IRS got involved in the picture" did petitioner decide he better indicate that he was retired (Tr. 326), he knew he was falsifying to the jury because it was his presentation that no IRS investigation on the petitioner occurred before June, 1970.[12] (A. 8-9) Thus, in implying to the

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[11] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[12] Childress testified his first interview with defendant was June 18, 1970 (A. 8-9).

jury that defendant lied to the agents, the prosecutor only demonstrated that it was he who was misstating the evidence, if not himself downright lying to the jury.

But the worst of the prosecutor's misrepresentations was yet to come. He falsely stated to the jury that the gold coin collection and the diamond were not in Eddie Cook's name, "but was in the name of a man in Chicago named John Clarence Cook." (Tr. 354) However, defense witness Brodsky had testified the coin collection and the diamond, both valued at $150,000, belonged to petitioner, Eddie Cook, and were returned to him. This testimony was unrebutted, except by the prosecutor's impermissible false insinuations to the contrary. (See Point 3A, *supra*).

And without any record evidence or proof, the prosecutor decided to become his own unsworn expert witness as to the practice in the wholesale diamond industry. He argued to the jury, "Ladies and gentlemen, why do we deal in cash? Do the legitimate diamond businesses deal in cash? Of course not. Why do we deal in cash, no records. Very convenient to support our testimony." (Tr. 355)

Yet, the prosecutor had had an opportunity to call in any wholesale diamond merchant he desired to rebut defense witness Chapman's testimony that for the most part their transactions were in cash, but he failed so to do.

C.

Compounding other prosecutorial misconduct, the prosecutor put the imprimatur of his office in impressing the jury that defendant "was lying." (Tr. 336)

The prosecutor also alluded to the petitioner's not taking the witness stand, which is his Fifth Amendment right. For the prosecution argued:

> "Today, I want to tell you, this case is not difficult to decide. There is an extremely large amount of evi-

> dence coming in here which shows that the defendant No. 1 spent the money, made many admissions as to taxable income. Only to the IRS and to you does he need hide because he has a technical income, because he has a cash hoard. There is evidence on the record that such a cash hoard did not exist. He was lying and purposely and wilfully evading the income tax." (Tr. 336)

By stating to the jury that defendant "hid" from them, the prosecutor suggested defendant chose not to take the stand. How else could he "hide" anything from the jury? There was no contact with the jury until petitioner faced the charges at trial. As in *Desmond* v. *United States*, 345 F.2d 225 (1 Cir. 1965), the comment here "can have no effect other than to invite the jury's attention to the fact that the . . . [defendant] had not taken the stand." *Id.* at 227. See also *United States* v. *Poole*, 379 F.2d 645, 649 (7 Cir. 1967); *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529, 530 (1 Cir. 1969); *Doty* v. *United States*, 416 F. 2d 887, 890 (10 Cir. 1968); *Barnes* v. *United States*, 8 F.2d 832, 834 (8 Cir. 1925).

In making the positive affirmation that petitioner "was lying," the prosecutor unfairly and illegally put the prestige of the great office of the United States Attorney behind such positive assertion. This invasion of the province of the jury "was blatantly improper. It invaded the province of the jury. It went beyond credibility." *Hall* v. *United States*, 419 F.2d 582, 587 (5 Cir. 1969). See also cases cited at p. 23, *supra*.

Plain Error

Considering the demonstration of the multiplicity of the prosecutor's prejudicial conduct during the course of trial (his improper cross examination) and in his viciously unfair closing argument, it is the government's heavy burden to demonstrate that the errors are harmless "beyond all

reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. *Chapman* made explicit that "an error in admitting plainly relevant evidence *which possibly influenced the jury adversely* to a litigant cannot . . . be concluded of as harmless. . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was *harmless beyond a reasonable doubt.*" *Id.* at 23-24 (Emphasis added.)

The cumulative effect of the prosecutorial misconduct herein, as demonstrated above, cannot, we submit, be held "harmless beyond a reasonable doubt."

The Court of Appeals never reached that determination, however, for it concluded that petitioner's failure to have raised below the matters claimed as error herein prevented their consideration by that court unless they could be deemed "plain error." (App. A, p. 6)[13] While the court characterized the "lying" argument as "altogether improper," (App. A, pp. 8-10), for reasons inexplicable, that court decided that there was no plain error in the totality of the prosecution misconduct as asserted herein such as to be cognizable on appeal. (App. A, p. 10)

Such conclusion is not only contrary to previous Fifth Circuit cases, but further, constitutes a substantial departure from numerous well-reasoned holdings from other Circuits. *Ginsberg* v. *United States,* 257 F.2d 950, 955 (5 Cir. 1958); *United States* v. *Simmons,* 414 F.2d 800 (9 Cir. 1969); *Gov't of Virgin Islands* v. *Oliver,* 360 F.2d 297, 299-300 (3 Cir. 1966); *United States* v. *Young,* 463 F.2d 934, 940 (D.C. Cir. 1971); *Dugan Drug Stores Inc.* v. *United States,* 326 F.2d 835, 837 (5 Cir. 1964).

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[13] The Court's determination that these matters were not raised below is factually erroneous; they were indeed raised in petitioner's post-trial motion for new trial.

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Because the case against petitioner was far from overwhelming (indeed, we argue insufficiency of evidence as a matter of law; see Points 1 and 2, *supra*), the prosecutor resorted to the prejudicial tactics described herein. But this Court ought not to suffer this conviction to stand in the face of the severe and repeated prosecutorial misconduct.

In the face of this misconduct, petitioner stands convicted in violation of due process of law.

To reiterate this Court's persistent position condemning such misconduct, and further, to resolve an apparent conflict amongst the Circuits as to the "plain error" aspects of this type of misconduct, certiorari should be granted, and petitioner should be relieved of the onus of his unconstitutionally obtained convictions.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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